Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PEGGY L. BURNS-TOOLE, D.D.S.,
Petitioner,

v.

ROGER P. BYRNE, D.D.S. and
RONALD H. SHAMBLIN, D.D.S.,
Individually and in their Official Capacities,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. On a complaint brought pursuant to 42 U.S.C. § 1983 alleging liability against state governmental officials for constitutional violations caused by religious discrimination in the course of testing in a dental licensure examination, is dismissal by the rendering of summary judgment under Rule 56 of the Federal Rules of Civil Procedure due to the complaint's failure to satisfy a "heightened pleading" requirement:

   a) Prohibited by the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure; and

   b) Prohibited by the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that rules of practice and procedure shall not abridge, enlarge or modify any substantive right?

2. Whether the dismissal, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, of the Petitioner's §§ 1985, 1986 civil rights actions against the Respondents on the grounds that §§ 1985, 1986 actions only apply to conspiracies motivated by racial animus was erroneous when applied to the law enumerated by the Supreme Court in *Carpenters v. Scott*, 463 U.S. 825 (1983)?

3. Whether the dismissal of Petitioner's § 1983 civil rights action without addressing the personal liability of the Respondents in their Official Capacity was erroneous when applied to the law enumerated by the Supreme Court in *Hafer v. Melo*, ___ U.S. ___ (1991), No. 90-681, slip op.?

4. Whether the rendering of summary judgment on Petitioner's § 1983 civil rights action on the grounds of qualified immunity was erroneous in light of the fact that said immunity was waived pursuant to Tex. Rev. Civ. Stat. Ann. art. 4551j?

5. Whether dismissal of Petitioner's claims for injunctive relief on the grounds that the Respondents are merely two of the many

members of the Texas State Board of Dental Examiners is erroneous when applied to the law enumerated by the Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Hafer v. Melo*, ___ U.S. ___ (1991), No. 90-681, slip op.?

LIST OF PARTIES

Petitioner certifies that the following is a complete list of the names of all parties:

PETITIONER:

Peggy L. Burns-Toole, D.D.S.

RESPONDENTS:

Roger P. Byrne, D.D.S.
Ronald H. Shamblin, D.D.S.

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Roger P. Byrne, D.D.S. and
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Individually and in their
Official Capacities

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PRAYER

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that court's January 19, 1994 Judgment and Opinion in this proceeding.

OPINIONS/ORDERS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit entered January 19, 1994, and from which review is sought, is reported at 11 F.3d 1270 (5th Cir. 1994), and is attached as Appendix "A."

The Order of the United States District Court for the Southern District of Texas entered February 18, 1993, and from which Petitioner appealed, is attached as Appendix "B."

The Final Judgment and Order of the United States District Court for the Southern District of Texas entered January 11, 1993, is attached as Appendix "C."

The Opinion and Order of the United States District Court for the Southern District of Texas entered January 11, 1993, is attached as Appendix "D."

The Order of the United States District Court for the Southern District of Texas staying all discovery and entered December 2, 1992, is attached as Appendix "E."

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was entered January 19, 1994. This Petition for Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case arises under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1983, 1985, 1986, Rule 8 of the Federal Rules of Civil Procedure, Tex. Rev. Civ. Stat. Ann. art. 4551j and 28 U.S.C. § 2072. The rule and statutes are reprinted in the Appendix as Appendices "F," "G," and "H."

STATEMENT OF THE CASE

This is a civil rights action pursuant to 42 U.S.C. §§ 1983, 1985 and 1986. Petitioner's Original Complaint was filed on August 21, 1992. 2R. 1-10. Among other things, it sought to hold the Respondents liable, both individually and in their Official Capacities, for violations of Petitioner's civil rights by punishing her for exercising the Free Exercise of Religion Clause of the First Amendment to the United States Constitution and violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. On November 24, 1992, Respondents, pursuant to Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure, filed a motion to dismiss or motion for summary judgment against Petitioner. 2R. 40-63. The bases for Respondents' motions were qualified immunity in their individual capacities and for failure to state a claim upon which relief can be granted. Respondents contemporaneously filed a motion to stay discovery until resolution of the issue of Respondents' qualified immunity. 2R. 36-39. On December 2, 1992, Judge Norman Black entered an order granting that motion. 2R. 68.

Petitioner then filed an Amended Complaint. 2R. 126-137. On January 11, 1993, Judge Black entered an opinion and order granting Respondents' motion to dismiss or motion for summary judgment. 2R. 119-125. Concurrently, Judge Black entered a final judgment in favor of Respondents pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. 2R. 147. On January 15, 1993, Petitioner timely filed a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure to reconsider the order granting Respondents' motion to dismiss or motion for summary judgment. 2R. 148-154. On February 16, 1993, Judge Black entered an order denying Petitioner's motion for reconsideration, 1R. 163, and Petitioner timely appealed from that order. 1R. 164.

On January 19, 1994, the Fifth Circuit issued an Opinion affirming the rendering of summary judgment of Petitioner's § 1983 claim and affirming the dismissal of Petitioner's §§ 1985, 1986 claims. The court held that Petitioner's First Amended Original Complaint did not satisfy the Fifth Circuit's "heightened pleading" requirement as to her § 1983 claim. Further, the Fifth

Circuit affirmed the dismissal of Petitioner's §§ 1985, 1986 claims for failure to state a claim and the district court's holding that §§ 1985, 1986 claims apply only to conspiracies which are motivated by racial animus.

The present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The question of whether a "heightened pleading" requirement may properly be applied to complaints against state government officials brought pursuant to 42 U.S.C. § 1983 represents an important question which has not been, but should be, decided by the Supreme Court.

It appeared that the Supreme Court would determine the validity of the "heightened pleading" requirement when it granted certiorari in *Siegart v. Gilley*, 500 U.S. ___, 111 S. Ct. 1789 (1991). The Supreme Court, however, did not reach the specific question in *Siegart* concerning the "heightened pleading" requirement when an individual capacity defendant has asserted a qualified immunity defense, but affirmed the lower court decision on other grounds. The Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___ (1993), No. 91-1657, held that a federal court may not apply a "heightened pleading" standard to a 42 U.S.C. § 1983 case alleging municipal liability. The Court further held that it had no occasion to consider whether its qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials. There appears to be a "circuit split" on this very issue. The present case is "ripe" for such a decision, and the Supreme Court is respectfully invited to finally resolve this issue.

II. The Fifth Circuit's decision to apply a "heightened pleading" requirement to complaints alleging individual liability under 42 U.S.C. § 1983 directly conflicts with the decisional law of the United States Court of Appeals for the Seventh Circuit, which has "depreciated" application of the "heightened pleading" requirement due to a conflict with the Federal Rules of Civil Procedure.

The Seventh Circuit in *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied sub nom. Propst v. Weir*, 502 U.S. ___, 112 S. Ct. 973, No. 91-955 (January 27, 1992), "depreciated" the application of the heightened pleading requirement because, in that court's view, "it appear[ed] to conflict with Rules 8, 9(b), and 56 of the Federal Rules of Civil Procedure."

Given the large number of actions filed in the Fifth Circuit under 42 U.S.C. § 1983, and the apparent "circuit split" on the heightened pleading requirement issue, the circuit split in question constitutes an intolerable set of circumstances which should be resolved by the Supreme Court.

III. The Fifth Circuit's decision to apply a "heightened pleading" requirement directly conflicts with the system of "notice" pleading mandated by Rule 8 of the Federal Rules of Civil Procedure and the Supreme Court's decisions in *Conley v. Gibson*, 355 U.S. 41 (1957) and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___ (1993), No. 91-1657, slip op.

Dismissal of a complaint for failure to state a claim, due to an alleged failure to set forth specific facts, is governed by Rule 8 of the Federal Rules of Civil Procedure and the Supreme Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957). In *Conley*, the respondents argued that the complaint filed by the petitioner "failed to set forth specific facts to support its general allegations." *Id.* at 47. The Supreme Court in *Conley* rejected respondents' argument and in doing so held:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases

> his claim. To the contrary, all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Id. at 47.

The Fifth Circuit's decision to apply a "heightened pleading" requirement enumerated in *Elliott v. Perez*, 751 F.2d 1472 (1985), to this and other similar cases directly conflicts with the system of "notice" pleading. The Fifth Circuit does not have the authority to arbitrarily abrogate Rule 8 of the Federal Rules of Civil Procedure, and it is mandatory that the Fifth Circuit "give the Federal Rules of Civil Procedure their plain meaning." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989), and "to apply the text, not to improve upon it." *Id.* at 126.

Judge Charles E. Clark, the Reporter of the Supreme Court's Committee on the Rules of Civil Procedure (incidentally the committee which drafted Rule 8), favorably cited by *Conley* referencing *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944), held that "there is no pleading requirement [under the Federal Rules of Civil Procedure] of 'stating facts sufficient to constitute a cause of action.'" The Supreme Court in *Leatherman* further held:

> [W]e think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules.

Id. slip op. at 3. The Fifth Circuit has systematically, deliberately and without instruction from the Supreme Court, departed from the mandates of "notice" pleading adopted by the Federal Rules of Civil Procedure and affirmed by this Court in *Conley* and *Leatherman*. This "rogue" departure cries out for corrective action by the Supreme Court immediately.

IV. The Fifth Circuit's decision to apply a "heightened pleading" requirement directly conflicts with the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that rules of practice and procedure "shall not abridge, enlarge, or modify any substantive right."

The Supreme Court has *never approved*, through its rule-making power delegated to it by Congress through the Rules Enabling Act, 28 U.S.C. § 2072, the Fifth Circuit's "heightened pleading" requirement in civil rights cases under 42 U.S.C. § 1983. The district court's order staying all discovery until the resolution of the qualified immunity issue effectively precluded the Petitioner from being able to bring forward sufficient facts to preclude dismissal. *See* Appendix "E." This is the very situation 28 U.S.C. § 2072(b) was designed to prevent. The "heightened pleading" requirement "abridges and modifies" the Petitioner's right to discoverable material reasonably calculated to lead to admissible evidence. *See* Appendix "H."

The Fifth Circuit in *Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986), held that "Plaintiff must plead specific facts with particularity before a Court may subject public officials to trial or *to pretrial discovery*." (Emphasis added). This practice by the Fifth Circuit is a "death penalty" to the majority of 42 U.S.C. § 1983 cases and impermissibly burdens plaintiffs beyond the requirements as set forth by Congress and the Supreme Court. *See Radovich v. National Football League*, 352 U.S. 445, 454 (1957) (rejecting "technical objections" to Sherman Act complaint).

V. The Fifth Circuit's decision to affirm, without comment, the district court's opinion that 42 U.S.C. §§ 1985, 1986 civil rights actions apply only to conspiracies motivated by racial animus conflicts with the decision of the Supreme Court in *Carpenters v. Scott*, 463 U.S. 825 (1983).

The trial court held and the Fifth Circuit affirmed, without comment, that 42 U.S.C. §§ 1985 [and 1986] apply only to conspiracies motivated by racial animus. The trial court based its ruling on the Fifth Circuit's holding in *Deubert v. Gulf Federal*

Savings Bank, 820 F.2d 754 (5th Cir. 1987). Both holdings are in direct conflict with the decision of the Supreme Court regarding conspiracies which violate the First and Fourteenth Amendments.

The Supreme Court in *Carpenters v. Scott*, 463 U.S. 825 (1983), clarified that violations of the First and Fourteenth Amendments would be violations actionable under § 1985. The Court went on to hold: "[W]e conclude that an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) *unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state.*" *Id.* at 830 (emphasis added).

The Court went further and stated:

> The Court does not require that the conspirators be state officials or act under color of state law. Instead, the requirement is that the conspiracy intend to cause the State or a person acting under color of state law to deprive the victims of the conspiracy of their constitutional rights.

Id. at 840.

Respondents Shamblin, Byrne and other unknown members of the Texas State Board of Dental Examiners, by the conduct alleged by the Petitioner more than meet the test as enumerated in *Scott*. Petitioner's Amended Complaint clearly states that she has been punished for exercising her religious beliefs. The animus shown toward the Petitioner by the Respondents influenced the opinions of at least two other members of the "T.S.B.D.E." and thus influenced their vote on the proficiency of the Respondent. The granting or denying of a dental license is the function of the "T.S.B.D.E." and is definitely state action. The conduct of Respondents Shamblin, Byrne and other unknown members of the "T.S.B.D.E." was designed to influence said state action. The *Scott* test has been met.

Further, since all discovery was stayed, the "heightened pleading" standard was applied by implication to Petitioner's §§ 1985, 1986 claims as well as her § 1983 claim. As stated above, this is totally impermissible and mandates corrective action by the Supreme Court.

VI. The Fifth Circuit's decision to affirm, without comment, the district court's opinion without addressing the "Official Capacity" liability of the Respondents directly conflicts with the decision of the Supreme Court in *Hafer v. Melo*, ___ U.S. ___ (1991), No. 90-681, slip op.

The Fifth Circuit affirmed the decision of the trial court without addressing the issue of the individual liability of the Respondents in their Official Capacities. This issue was squarely before the Fifth Circuit and fully briefed in that court as well as the trial court.

The Fifth Circuit wholly failed to cite any case or statute that would have precluded the Respondents from being held personally liable in their Official Capacities for 42 U.S.C. § 1983 violations. The Supreme Court in *Hafer v. Melo*, ___ U.S. ___ (1991), No. 90-681, slip op., has held that state officers may be held personally liable for damages under § 1983 based upon actions taken in their official capacities.

The Court additionally held:

> [S]ince *Ex parte Young*, 209 U.S. 123 (1908), we said, "it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law . . ." While the doctrine of *Ex parte Young* does not apply where a plaintiff seeks damages from the public treasury, damage awards against individual defendants in federal courts "are a permissible remedy in some circumstances notwithstanding the fact that they hold public office . . ." That is, the Eleventh Amendment does not erect a barrier against suits to impose "individual and personal liability" on state officials under § 1983.

Hafer, slip op. at 9.

The Fifth Circuit's decision to affirm the trial court's ruling that the Petitioner has sued the Respondents for monetary damages is clearly without merit, totally erroneous, and mandates correction and reversal by the Supreme Court.

VII. The Fifth Circuit's interpretation of Tex. Rev. Civ. Stat. Ann. art. 4551j runs against the "plain meaning" of the statute.

Tex. Rev. Civ. Stat. Ann. Article 4551j states:

> *In the absence of fraud, conspiracy, or malice*, no member of the Texas State Board of Dental Examiners, . . . shall be liable or subject to suit or suits for damages for alleged injury, wrong, loss or damage allegedly caused by any of said persons for any . . . evaluation . . . made in the course of any of said persons performing assigned, designated, official, or statutory duties. This immunity is enacted to relieve and protect the persons named from being harassed and threatened with legal action while attempting to perform official duties.

(Emphasis added).

Petitioner's Amended Complaint has clearly pled *conspiracy and malice*, and as such, the Respondent's qualified immunity has been waived by State statute.

The Fifth Circuit totally ignored the introductory statement of the statute and instead focused on its conclusory statement. The interpretation rendered by the Fifth Circuit has changed the "plain meaning" of the statute. The Fifth Circuit has again impermissibly improved upon the text instead of applying it. *See Pavelic & Leflore*, 493 U.S. at 123, 126. This departure warrants corrective action by the Supreme Court.

VIII. The Fifth Circuit's decision to affirm, without comment, the trial court's denial of injunctive relief directly conflicts with the Supreme Court's decisions in *Ex parte Young*, 209 U.S. 123 (1908); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Hafer v. Melo*, ___ U.S. ___ (1991), No. 90-681, slip op.

The Fifth Circuit's decision to affirm the trial court's dismissal of Petitioner's claims for injunctive relief totally ignores and disregards Supreme Court precedent.

Respondent Byrne, at the time of the incidents which made basis this lawsuit, was President of the "T.S.B.D.E." Respondent Shamblin, at the time of the incidents which made basis this lawsuit, was Secretary of the "T.S.B.D.E."

The Supreme Court in *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985), emphasized that official capacity suits "generally represent[] only another way of pleading an action against an entity of which an officer is an agent . . . A suit against a state official in her [his] official capacity therefore should be treated as a suit against the State."

In *Hafer v. Melo*, ___ U.S. ___ (1991), No. 90-681, slip op. at 3, the Court held, "Indeed, when an official sued in this capacity in federal court dies or leaves office, her [his] successor automatically assumes her [his] role in the litigation." *See also* Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c)(1); U.S. Supreme Court Rule 35.3.

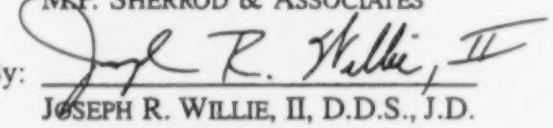
It is the official office the Respondents hold and the state entity or agency they purport to represent that are the "real parties in interest" in an official capacity suit. Thus, the named Respondents as well as the "T.S.B.D.E." would be amenable to injunctive relief in an official capacity suit. *See also Ex parte Young*, 209 U.S. 123 (1908). The Fifth Circuit's decision ignores stare decisis and mandates that the Supreme Court exercise its supervisory powers over the federal courts to correct this erroneous decision.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the January 19, 1994 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

M.P. SHERROD & ASSOCIATES

By: 

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APPENDIX "A"

Peggy L. BURNS-TOOLE, D.D.S.,
Plaintiff-Appellant,

v.

Roger P. BYRNE, D.D.S. and Ronald H. Shamblin, D.D.S., Defendants-Appellees.

No. 93-2202.

United States Court of Appeals,

Fifth Circuit.

Jan. 19, 1994

Applicant for dental license who requested religious accommodation brought civil rights action for religious discrimination against members of Texas State Board of Dental Examiners. The United States District Court for the Southern District of Texas, Norman W. Black, Chief Judge, entered summary judgment for examiners, and applicant appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) applicant failed to state § 1983 claim, and (2) applicant failed to state § 1985 claim for conspiracy to deprive her of equal protection of the laws.

Affirmed.

1. Federal Courts

Court of Appeals reviews district court's dismissal of plaintiff's claims and grant of summary judgment de novo. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

2. Federal Courts

When reviewing district court's grant of summary judgment, appellate court applies the same test as that applied by district court, without reference to district court's ultimate conclusion. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

3. Federal Civil Procedure

Summary judgment should be granted where any essential element of plaintiff's cases is without factual support. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

4. Federal Civil Procedure
Federal Courts

Appellate review of motion to dismiss is the same as that applied at the trial level; if plaintiff can prove no set of facts in support of her claims that would entitle her to relief, dismissal is proper.

5. Civil Rights

Action brought under § 1983 against state actor in his individual capacity is subject to defense of qualified immunity. 42 U.S.C.A. § 1983.

6. Civil Rights

Burden is on civil rights plaintiff to overcome state actor's defense of qualified immunity and, to do so, plaintiff must show that actor's conduct was not objectively reasonable and that actor violated clearly established law and must plead specific facts with a level of particularity so that they would, if proved, warrant relief plaintiff seeks.

7. Officers and Public Employees

Plaintiff cannot overcome defense of qualified immunity with mere conclusory statements evidencing only personal belief that defendant was motivated by impermissible animus.

8. Civil Rights

Member of Texas State Board of Dental Examiners' alleged statement "who did she think she is" with regard to applicant's request for special accommodation because of her religion, standing alone, did not support applicant's § 1983 claim for religious discrimination; although alleged remark might reflect hostility towards those who request special accommodations or may even reflect hostility towards applicant as individual, statement was not probative of whether applicant was victim of religious discrimination and applicant failed to tie this statement to any adverse action taken by examiners, let alone any action that was motivated by discriminatory animus. 42 U.S.C.A. § 1983.

9. Civil Rights

Applicant for dental license who requested special accommodation because of her religious beliefs, failed to state § 1983 claim for religious discrimination against members of Texas State Board of Dental Examiners; examiner's alleged statement "who did she think she is" with regard to applicant's request for special accommodation, standing alone, was not probative of whether applicant was victim of religious discrimination, applicant failed to tie alleged statement to any adverse action taken by examiners, let alone any action that was motivated by discriminatory animus, applicant failed to counter examiner's assertion that he was unaware of her religious beliefs at time that he graded her exam, two other impartial examiners voted to fail applicant, and applicant's failure of a second test for which she did not seek religious accommodation cut against her argument that, but for alleged discriminatory animus directed at her, she would have passed first test. 42 U.S.C.A. § 1983.

10. Conspiracy

To assert claim under § 1985 for conspiracy to deprive persons of rights or privileges, plaintiff must allege some class-based animus. 42 U.S.C.A. § 1985(3).

11. Conspiracy

Applicant for dental license who requested religious accommodation failed to state § 1985 claim for conspiracy to deprive her of equal protection of the laws or of equal privileges and immunities under the law against members of Texas State Board of Dental Examiners; applicant failed to present any evidence in support of proposition that examiners discriminated against her religious denomination as a class and board granted her request for religious accommodation. 42 U.S.C.A. § 1985(3).

12. Federal Courts

District court may entertain state law claims pursuant to its supplemental jurisdiction provided that claims arise from case or controversy over which district court had original jurisdiction. 28 U.S.C.A. § 1367(a).

13. Federal Courts

When all federal claims are dismissed, i.e., those over which district court had original jurisdiction, district court enjoys wide discretion in determining whether to retain jurisdiction over the remaining state law claims and the wide discretion afforded trial judge translates into deference by reviewing court. 28 U.S.C.A. § 1367.

14. Federal Courts

District court did not err when it dismissed civil rights plaintiff's state law claims rather than exercise its supplemental

jurisdiction, where statute of limitations had run on plaintiff's state law claims. 28 U.S.C.A. § 1367.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, HIGGINBOTHAM, and SMITH, Circuit Judges.

WISDOM, Circuit Judge:

In this case we address allegations by an applicant for a dental license that she suffered religious discrimination in the course of the testing process. Because we can find no evidence upon which such allegations might properly be based, we affirm the district court's dismissal of her claims and grant of summary judgment.

I.

The plaintiff/appellant, Dr. Peggy Burns-Toole, is an African-American, Seventh-Day Adventist. She is a graduate of the School of Dentistry at Meharry Medical College in Tennessee and has been licensed to practice dentistry in Illinois since 1986. At the time of the incidents at issue, the defendants/appellees, Dr. Roger Byrne and Dr. Ronald Shamblin were appointed members of the Texas State Board of Dental Examiners ("T.S.B.D.E.").

Dr. Burns-Toole moved from Illinois to Texas and applied to take the August 1990 state dental examination. The test was to be given on Thursday, August 23 through Saturday, August 25, 1990. Burns-Toole filed a written request for an examination variance because any work by her on the evening of the 24th and the day of the 25th conflicted with the tenets of her religion. The board granted her request. She took the remaining portions of the examination on Wednesday, August 22, 1990.

Dr. Shamblin graded a portion of her examination taken on one of the regularly scheduled days. He knew her only as "Applicant # 7" and had no access to information on her religious background.

During the examination, Dr. Burns-Toole's equipment malfunctioned. Although she lost time, she was given additional time at the end of the test as compensation. Whether the equipment malfunction affected her or not, Dr. Shamblin concluded that Dr. Burns-Toole's performance on the "gold onlay casting section" of the examination was inadequate. He conferred with two other examiners who concurred with his assessment. The three examiners decided that she had failed the test.[1]

During the evening of the second day of the examination, Dr. Burns-Toole met with Dr. Zeb Poindexter, a member of a statewide professional association of African-American dentists. The T.S.B.D.E. had granted Dr. Poindexter permission to monitor the progress of African-American applicants and the conduct of T.S.B.D.E. in the light of the high failure rates of African-American examinees.

Dr. Burns-Toole alleges that Dr. Poindexter admonished her about seeking the variance out of concern that it would call attention to her. Worse, Dr. Poindexter allegedly relayed to her that Dr. Shamblin, one of the examiners who failed her, had stated: "Who did she think she is," with regard to her request for a special accommodation. Dr. Burns-Toole also contends that Dr. Shamblin said to her directly, "You're going to be here next year," an apparent reference to her impending failure which would require her to re-take the test.

Dr. Burns-Toole applied to take the examination again on May 28-30, 1992. This time she sought no variance or special accommodation. A panel of three examiners found her radiograph deficient and, again, she failed.[2] Defendant Byrne, in his capacity as President of T.S.B.D.E., notified Dr. Burns-Toole of her failure. Dr.

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[1]It takes three examiners to agree on an applicant's failure.

[2]An applicant must formulate a diagnosis and treatment plan for a patient based upon a set of x-rays. The radiograph is the result.

Byrne had no other interaction with Burns-Toole regarding the issues presented today. Moreover, he was, at all times, unaware of her religious beliefs.

Had Dr. Burns-Toole taken the examination and failed a third time, she would have been barred from ever taking the test again in Texas. Instead, she brought suit against Drs. Byrne and Shamblin, in their individual and official capacities, under 42 U.S.C. §§ 1983, 1985, and 1986 for religious discrimination and for conspiracy to deprive her of her right to practice her religion freely. She also brought claims under the First and Fourteenth Amendments. The defendants filed a Motion to Dismiss or for Summary Judgment.

The district court granted the defendants' motion and entered a final judgment. With respect to her § 1983 claim, the district court held that Dr. Burns-Toole had failed to present any factual allegations sufficient to overcome the defendants' qualified immunity.[3] The district court dismissed her § 1985 claim on the grounds that § 1985 applies only to allegations of racial animus. Because a § 1985 claim is a prerequisite for a valid § 1986 claim, the judge dismissed the latter as well. Last, he dismissed Dr. Burns-Toole's request to maintain supplemental jurisdiction over her pendent state law claims even though the federal claims were dismissed. The district court then denied her motion to reconsider the order granting summary judgment. This appeal followed.

After consideration of the plaintiff's arguments, we conclude that the district court properly dismissed her claims and granted the defendants summary judgment. We need not reach a number of legal points to which she ascribes error because the facts upon which she bases her claims are so wanting as to leave little doubt that the district court was correct.

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[3]The district judge properly dismissed her First and Fourteenth Amendment claims as well, citing the rule that the proper vehicle for these allegations is § 1983. *Hearth, Inc. v. Texas Department of Public Welfare*, 617 F.2d 381, 382-83 (5th Cir. 1980).

II.

[1-4] We review the district court's dismissal of the plaintiff's claims and grant of summary judgment de novo.[4] As to summary judgment, the appellate court applies the same Fed. R. Civ. P. 56(c) test applied by the district court, without reference to the district court's ultimate conclusion.[5] A grant of summary judgment is appropriate where there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[6] Summary judgment should be granted where any essential element of the plaintiff's case is without factual support.[7] Similarly, with respect to a motion to dismiss, appellate review is the same as that applied on the trial level. If the plaintiff can prove no set of facts in support of her claims that would entitle her to relief, dismissal is proper.[8]

III.

The points of error that the plaintiff attributes to the district court are based primarily on sophisticated legal issues. Although these questions have an undeniable academic appeal, we need not address them here. Instead, the disposition of this case turns on the plaintiff's failure to present any evidence that demonstrates that she has been the victim of religious discrimination.[9]

[5] The heart of Dr. Burns-Toole's case is 42 U.S.C. § 1983. An action brought under § 1983 against a state actor in his

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[4]*Estate of Carter through Taggert v. U.S.*, 921 F.2d 63, 65 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 73, 116 L. Ed. 2d 47 (1991).

[5]*Id.*

[6]Fed. R. Civ. P. 56(c).

[7]*Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265, 274 (1986).

[8]*Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir.), *cert. denied*, 498 U.S. 908, 111 S. Ct. 279, 112 L. Ed. 2d 233 (1990).

[9]*See Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 172 n.2 (5th Cir. 1985) (a narrow ground for decision renders "a number of latent and potentially thorny issues" unnecessary for disposition of the case).

individual capacity, however, is subject to the defense of qualified immunity. The district court dismissed the § 1983 claim because of the plaintiff's failure to plead facts with adequate particularity sufficient to overcome that immunity as concerns Drs. Byrne and Shamblin.

The cloaking of state actors with a qualified immunity is grounded in the belief that a government cannot operate efficiently if its employees and agents are subjected to the costly and time-consuming rigors of trial and discovery.[10] Instead, state actors should be able to act freely, within the bounds prescribed by law, but without the fear of consequences. The absence of this immunity would, as Judge Learned Hand has said, "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[11]

[6] The burden is on the plaintiff to overcome a defendant's defense of qualified immunity.[12] To do so, the plaintiff must show that the defendants' conduct was not objectively reasonable and, further, that the defendants violated clearly established law.[13]

[7] Moreover, the plaintiff must plead specific facts with a level of particularity so that they would, if proved, warrant the relief she seeks.[14] We have previously explained the plaintiff's obligation:

> In cases against government officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaints state with factual detail and particularity the bases for the claim which

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[10] *See Harlow*, 457 U.S. at 818-19, 102 S. Ct. at 2738-39, 73 L. Ed. 2d at 410-11.

[11] *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950).

[12] *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012, 103 S. Ct. 1253, 75 L. Ed. 2d 481 (1983).

[13] *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 411 (1982).

[14] *See Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986).

> necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.[15]

In other words, Dr. Burns-Toole cannot prevail with mere conclusory statements evidencing only a personal belief that the defendants were motivated by an impermissible animus.

[8, 9] The district court concluded that the plaintiff failed to meet this burden. Dr. Burns-Toole founds her allegations of religious discrimination on one statement, a statement which does nothing to support her legal claims. The statement, relayed by Dr. Poindexter to her, allegedly was made by Dr. Shamblin, one of the examiners who failed her. According to Dr. Poindexter, Dr. Shamblin had stated, "Who did she think she is," with regard to her request for a special accommodation.[16]

This remark might reflect a hostility towards those who request special accommodations. It even may reflect a hostility towards the plaintiff as an individual. The statement is not, however, probative of whether the plaintiff was the victim of discrimination on the basis of her religion. She has presented nothing that could lead to this conclusion.

Moreover, Dr. Burns-Toole has failed to tie this statement to any adverse action taken by Shamblin, Byrne, or the T.S.B.D.E., let alone any action that was motivated by a discriminatory animus. Implicit in her claim is that Dr. Shamblin failed her because of her request for a special accommodation. Yet, she has not countered Dr. Shamblin's assertion that he was unaware of her religious beliefs at the time he graded her exam.[17] In addition, she has not addressed the damaging evidence that two other impartial examin-

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[15] *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985).

[16] It is true that Dr. Burns-Toole also contends that Dr. Shamblin said to her directly, "You're going to be here next year." This remark, however, does nothing to bolster her claim beyond the "who does she think she is" statement.

[17] Dr. Shamblin and Dr. Byrne filed affidavits with the district court in which they stated that they had no knowledge of the plaintiff's religion at the time she tested or was graded.

ers voted to fail "Applicant # 7." She has, to date, brought no claims against them.

The paucity of her evidence notwithstanding, Dr. Burns-Toole cannot overcome a fundamental causation problem: She failed the test the next time she took it, and this time she failed a different portion of the test. In this second instance, three examiners against whom the plaintiff has made no allegations voted to fail her. She had not sought a religious accommodation for this examination and she has not alleged that the examiners failed her because of her request two years earlier. The failure on the second test cuts against her argument that, but for the discriminatory animus directed at her, she would have passed the first test.

The plaintiff seeks to side-step her lack of evidence by attacking the standard that the district court applied to her claim. Specifically, she asks us to revisit the case of *Elliott v. Perez*[18], in which the Fifth Circuit adopted the "heightened pleading standard" in causes of action brought under § 1983, and reevaluate it in the light of the Supreme Court's recent decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit.*[19]

We decline this invitation. Under the most generous standard applicable to a motion for summary judgment, Dr. Burns-Toole could not prevail. She has, in no way, created an issue of material fact on whether the defendants' conduct was sufficient to sustain a § 1983 claim.[20]

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[18]751 F.2d 1472 (5th Cir. 1985).

[19]In that case, the Court held that the heightened pleading standard was inconsistent with the notice pleading set up by the Federal Rules of Civil Procedure in a suit against a municipality. ___ U.S. ___, ___ _ ___, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517, 523-24 (1993). The Court, however, explicitly reserved the question of whether the heightened pleading standard could still apply to suits against individual state officials asserting qualified immunity. *Id.* at ___, 113 S. Ct. at 1162, 122 L. Ed. 2d at 523.

[20]In the light of Burns-Toole's failure to meet even the general summary judgment standard, the district court was justified in dismissing the suit against the defendants in their individual and official capacities.

The plaintiff nonetheless argues that the district court should have recognized the abrogation of the defendants' qualified immunity by Texas statute.[21] That statute provides immunity for any member of the T.S.B.D.E., its employees, or witnesses called to testify on its behalf in the absence of fraud, conspiracy, or malice.[22] Dr. Burns-Toole argues that because she pleaded conspiracy, the statute waives the immunity asserted by the defendants.

The statute is not a waiver of immunity at all but, rather, a statement explicitly granting immunity. In those circumstances where fraud, conspiracy, or malice are pleaded, the statute would not apply at all. The purpose of the statute, as stated plainly on its face, is to grant immunity to board members so that they will not be subjected constantly to lawsuits.[23]

If we were to read Article 4551j as a waiver of the state's immunity, it would be a striking departure from the principle that when a state seeks to waive its immunity, it must do so by "the most express language or by such overwhelming implication from the text . . . ."[24] The statute at issue here does not cross that strict threshold.

IV.

That leaves only the plaintiff's claim under § 1985(3) that the defendants conspired to deprive her of her freedom to practice religion. Dr. Burns-Toole asks us to join the legal debate concerning the reach of § 1985 and address specifically whether it applies

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[21]TEX. REV. CIV. STAT. ANN. Article 4551j (West 1993).

[22]*Id.*

[23]The unambiguous provision stating the law's purpose reads: "This immunity is enacted to relieve and protect the persons named from being harassed and threatened with legal action while attempting to perform official duties." *Id.*

[24]*Atasadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40, 105 S. Ct. 3142, 3145-46, 87 L. Ed. 2d 171, 178 (1985).

to religious discrimination.[25] That debate, however interesting, is unnecessary to the resolution of the present case.

[10, 11] In order to assert a claim under § 1985(3), a plaintiff must allege some class-based animus. At that point, the court can decide whether the class against which the defendants allegedly discriminated is within the parameters of § 1985(3). In the case at hand, Dr. Burns-Toole has wholly failed to identify evidence which shows such class-based discrimination. She contends that she was discriminated against because she is a Seventh Day Adventist. She has failed, however, to present any evidence in support of the proposition that the defendants discriminate against Seventh Day Adventists as a class.

The evidence she has offered hurts rather than helps her case. The board granted her request for a special day on which she could take the examination and her request for more time. A typical case within this context would have alleged discrimination if the plaintiff and similarly situated class members were forced to a choice between their religion and the scheduled testing dates. Here, however, the defendants saved Burns-Toole from that dilemma by granting her a special accommodation. In sum, her evidence—so wanting as support for her § 1983 action—is even weaker with

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[25]There is little doubt that the reach of § 1985 poses an interesting question. Since the Supreme Court stated in *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798, 29 L. Ed. 2d 338, 348 (1971), that a cause of action brought under § 1985(3) requires an allegation of conspiracy motivated by "some racial or perhaps otherwise class-based, invidiously discriminatory animus," scholars and judges have attempted to define the parameters of "otherwise class-based". Subsequent decisions have addressed this phrase in particular contexts, but refused to indicate its outside boundaries. *See, e.g., United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983) (Court refused to extend § 1985(3) to conspiracies motivated by commercial or economic views, status, or activities); *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (Court refused to extend § 1985(3) to conspiracies against women seeking abortions).

regard to a showing of class-based discrimination under § 1985(3).[26]

V.

[12-14] Finally, the plaintiff charges that the district court committed error when it dismissed her state law claims, rather than exercise its supplemental jurisdiction, in spite of the fact that the statute of limitations had run. A district court may entertain state law claims pursuant to its "supplemental jurisdiction," provided that the claims arise from the case or controversy over which the district court had original jurisdiction.[27] When all federal claims are dismissed—i.e., those over which the district court had original jurisdiction—the district court enjoys wide discretion in determining whether to retain jurisdiction over the remaining state law claims.[28]

The wide discretion afforded the trial judge translates into deference by a reviewing court: "We do not lightly disturb a district court's § 1367 determination to remand state law claims."[29] We will not do so here. Based upon our review and analysis of the evidence, that the statute of limitations has run on Burns-Toole's state law claims hardly dictates a result which we, in the interest of justice, cannot countenance.

For the foregoing reasons, the district court judgment is

AFFIRMED.

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[26]Although the district court granted the defendants' motion to dismiss with respect to the § 1985 claim, it should be clear from our discussion that the evidence presented could not get Burns-Toole past summary judgment on this point either.

[27]28 U.S.C. § 1367(a).

[28]*See Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993) (per curiam).

[29]*Id.*

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PEGGY L. BURNS-TOOLE, D.D.S.,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-92-2552
	§	
ROGER P. BYRNE, et al.,	§	
Defendants.	§	

ORDER

This case is before the Court on Plaintiff's Motion for Reconsideration of the order granting Defendants' motion for summary judgment. The Court has reviewed the record in this case and finds that the entry of summary judgment in favor of Defendants was correct and proper. Accordingly, it is hereby

ORDERED that the motion for reconsideration (Entry #25) is **DENIED**.

SIGNED this 16th day of February, 1993, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PEGGY L. BURNS-TOOLE, D.D.S., Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-92-2552
ROGER P. BYRNE, D.D.S. and RONALD H. SHAMBLIN, D.D.S., Defendants.	§	

FINAL JUDGMENT AND ORDER

In accordance with the order issued this day, it is hereby

ORDERED that Plaintiff's Motion to Amend (Entry #15) is **GRANTED**; and

ORDERED that Defendants' Motion to Amend (Entry #19) is **GRANTED**; and

ORDERED that Defendants' Motion to Dismiss or for Summary Judgment (Entry #12) is **GRANTED**.

THIS IS A FINAL JUDGMENT AND ORDER.

SIGNED this 6th day of January, 1993, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PEGGY L. BURNS-TOOLE, D.D.S., Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-92-2552
ROGER P. BYRNE, D.D.S. and RONALD H. SHAMBLIN, D.D.S., Defendants.	§	

ORDER

This case is before the Court on Plaintiff's Motion to Amend her complaint, Defendants' Motion to Amend their answer, and Defendants' Motion to Dismiss or For Summary Judgment. The Court finds that the interests of justice require that the requested amendments be permitted, and has reviewed the Motion to Dismiss or For Summary Judgment with reference to the Amended Complaint.

It is undisputed that Plaintiff's religious denomination is Seventh-Day Adventist and that, in keeping with her religious beliefs, she cannot practice her profession on Friday evenings and all day Saturday. The examination for a dental license in Texas was scheduled for a Friday and Saturday, and plaintiff requested and obtained permission to take the August 1990 examination at an alternate time. Plaintiff failed the examination when Defendant Shamblin and two other examiners determined that Plaintiff had failed the onlay portion of the examination. Two years later, Plaintiff took the May 1992 examination, but did not request accommodation for her religion. Plaintiff failed the May 1992 exam when three examiners advised Defendant Byrne that Plaintiff had

failed the radiograph portion of the examination. Plaintiff alleges her failures were the result of religion-based discrimination on the part of Defendants. Plaintiff asserts causes of action pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986, the First and Fourteenth Amendments to the United States Constitution, and various provision of the Texas Constitution and Texas state law.

Defendants deny Plaintiff's allegations and have moved to dismiss or for summary judgment supported by their affidavits. Plaintiff has filed a response in opposition to Defendants' motion supported by her affidavit, and has submitted an amended complaint which has been considered by the Court in arriving at its decision. The Court finds that Defendants' motion must be granted as to the federal claims and that the pendent state law claims should be dismissed without prejudice to any right Plaintiff may have to file those claims in state court.

42 U.S.C. § 1981

Plaintiff asserts that Defendants' conduct constitutes a violation of 42 U.S.C. § 1981, which provides that all persons shall have the same right to make and enforce contracts as white citizens. Section 1981 prohibits racially motivated discrimination, and does not provide a remedy for discrimination based on religion. See Runyon v. McCrary, 427, U.S. 160, 167 (1976). As a result, Plaintiff's § 1981 claim must be dismissed.

42 U.S.C. §§ 1985 and 1986

Section 1985 also applies only to conspiracies motivated by racial animus. Deubert v. Gulf Federal Savings Bank, 820 F.2d 754 (1987). Accordingly, the § 1985 claim must be dismissed. Because a claim pursuant to section 1986 requires the existence of a § 1985 claim, Guillory v. St. Landry Parish Police Jury, 802 F.2d 822, 825 (5th Cir. 1986), cert. denied 482 U.S. 916 (1987); Bradt v. Smith, 634 F.2d 796 (5th Cir.), cert. denied 454 U.S. 830 (1981), and because the § 1985 claim must be dismissed as discussed above,

the Court must also dismiss Plaintiff's claim under 42 U.S.C. § 1986.

FIRST AND FOURTEENTH AMENDMENTS

Plaintiff alleges a violation of the Free Exercise of Religion Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A claim cannot be maintained against state officials directly under the First or Fourteenth Amendments where a claim can be asserted under 42 U.S.C. § 1983. See Hearth, Inc. v. Texas Department of Public Welfare, 617 F.2d 381 (5th Cir. 1980). Because Plaintiff has stated a claim under § 1983 and because the same defenses and immunities would apply to a constitutional claim, the Court finds that the First and Fourteenth Amendment claims must be dismissed.

42 U.S.C. § 1983

Claims against Defendants in their individual capacity are subject to a defense of qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800 (1982). A qualified immunity analysis must focus on the objective reasonableness of the officials' conduct; Plaintiff must specifically plead facts from which the Court could find that Defendants' conduct violated a clearly established law of which a reasonable person would have known. Harlow, 457 U.S. at 818. The burden is on Plaintiff to overcome Defendants' qualified immunity, Saldana v. Garza, 684 F.2d 1159, 1163 (5th Cir. 1982), cert. denied 460 U.S. 1012, (1983), and bare allegations do not suffice to subject a government official either to the cost of trial or the burdens of costly and time-consuming discovery. Harlow, 457 U.S. at 818; Elliot v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985). Plaintiff must plead specific facts with particularity before a Court may subject public officials to trial or to pretrial discovery. Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986).

In the case at bar, Plaintiff's only factual allegation which might appear to tie Defendants' conduct to her religion is a statement to her by a Dr. Poindexter, who told Plaintiff that

Defendant Shamblin said "who did she think she was" when he was told that a special testing schedule would be made available for Plaintiff. This allegation does not, however, indicate that Defendant Shamblin was aware of the religious basis for the accommodation. To the contrary, Shamblin has filed an affidavit in which he asserts that he was not aware of Plaintiff's religion, that two other examiners concurred in his opinion that the onlay was not properly placed, and that her special accommodation did not affect him because he was involved only in the onlay portion on Friday as regularly scheduled. Byrne has filed an affidavit in which he asserts that he did not know Plaintiff's religion, that he did not decide if Plaintiff passed or failed the exam (he was not an examiner), and that three examiners advised him as President of the Board of Examiners that Plaintiff had failed the dental radiographs portion of the exam. Plaintiff does not present evidence, by affidavit or otherwise, to contradict Defendants' statements that they were unaware of Plaintiff's religion and that their decisions were not based on religious animus. The Court finds that Plaintiff has failed to present any factual allegations, beyond her personally held beliefs, sufficient to overcome Defendants' qualified immunity.

The Court finds Defendants' qualified immunity defense particularly strong when viewed against the causation problems in Plaintiff's original and amended complaints. Plaintiff failed the exam twice, first in August 1990 when she was given special accommodation and Dr. Shamblin along with two other examiners against whom Plaintiff has made no allegations of discrimination determined that Plaintiff had failed the onlay portion of the examination, and again in May 1992 when she did not request special accommodation and three examiners against whom Plaintiff has made no allegations advised Dr. Byrne that Plaintiff had failed the radiograph portion of the examination. In neither case could the named Defendant have cause Plaintiff to fail the examination, regardless of any animus based on religion, because it is undisputed that the concurrence of three examiners is required for a determination of failure.

Suit in federal court for monetary relief against Defendants in their official capacity as members of a State agency is barred by

the Eleventh Amendment. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984).

CLAIM FOR INJUNCTIVE RELIEF

Plaintiff's claims against the individual defendants in their official capacity for injunctive relief should also be dismissed. Because the named defendants are merely two of many members of the Texas Board of Dental Examiners, Plaintiff has failed to show that these two individuals have the authority to carry out any injunctive relief requested by Plaintiff. See Bagg v. University of Texas Medical Branch, 726 S.W.2d 582, 585, n.2 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

CONCLUSION

Based upon the foregoing, the Court finds that Defendants' Motion to Dismiss or for Summary Judgment is well-taken and should be granted as to Plaintiff's federal law claims. Having dismissed the federal claims, the pendent state law claims should also be dismissed without prejudice to any rights Plaintiff may have to bring those claims in the state system. An appropriate final judgment and order consistent herewith shall be issued this day.

SIGNED this 6th day of January, 1993, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PEGGY L. BURNS-TOOLE, D.D.S., Plaintiff	§	
V.	§	CIVIL ACTION NO. H-92-2552
ROGER P. BYRNE, D.D.S., Individually and in his Official Capacity, and RONALD H. SHAMBLIN, D.D.S., Individually and in his Official Capacity, Defendants	§	

ORDER

Came on to be considered Defendants' Motion to Stay Discovery and the Court is of the opinion that the Motion is meritorious and should be GRANTED.

It is ORDERED that until resolution of the issue of Defendants' qualified immunity, all discovery is stayed.

SIGNED this the 2nd day of December, 1992.

/s/ Norman W. Black
UNITED STATES DISTRICT JUDGE

APPENDIX "F"

FEDERAL RULES OF CIVIL PROCEDURE

Effective September 16, 1938
Including Amendments Received Through
February 1, 1992

RULE 8. GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

[Amended effective July 1, 1966; July 1, 1968; July 1, 1970; August 1, 1987.]

APPENDIX "G"

TEXAS REVISED CIVIL STATUTES ANNOTATED

Article 4551j. CIVIL IMMUNITY, OFFICIAL ACTS

In the absence of fraud, conspiracy, or malice, no member of the Texas State Board of Dental Examiners, its employees, nor any witness called to testify by said Board, nor any consultant or hearing officer appointed by said board shall be liable or subject to suit or suits for damages for alleged injury, wrong, loss, or damage allegedly caused by any of said persons for any investigation, report, recommendation, statement, evaluation, finding, order, or award made in the course of any of said persons performing assigned, designated, official, or statutory duties. This immunity is enacted to relieve and protect the persons named from being harassed and threatened with legal action while attempting to perform official duties. (Acts 1977, 65th Leg., p. 1151, Ch. 436).

APPENDIX "H"

RULES ENABLING ACT

28 U.S.C. § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for purposes of appeal under § 1291 of this title.

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(2)

No. 93-1815

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PEGGY L. BURNS-TOOLE, D.D.S.,
Petitioner

vs.

ROGER P. BYRNE,D.D.S.and
RONALD H. SHAMBLIN, D.D.S.,
Individually and in their Official Capacities,
Respondents

Respondents' Brief in Opposition to Petition for Writ of Certiorari

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11 pp

QUESTION PRESENTED

Whether the Fifth Circuit was correct in its decision to affirm the summary judgment rendered in favor of the Respondents on the basis of qualified immunity, and on the basis of the merits of the Petitioner's complaint.

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No. 93-1815

IN THE
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PEGGY L. BURNS-TOOLE, D.D.S.,
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Individually and in their Official Capacities,
Respondents

Respondents' Brief in Opposition to
Petition for Writ of Certiorari

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. §§ 1983, 1985 and 1986, and Tex. Rev. Civ. Stat. Ann. art. 4551j (West 1993)

STATEMENT OF THE CASE

Respondents accept in general the factual description presented by Petitioner, with the exception of Petitioner's characterization of the Fifth Circuit's opinion. Petitioner insists (and this is the basis of her petition for certiorari) that the Fifth Circuit applied a "heightened pleadings" requirement to her §1983 claim. In fact, the Fifth Circuit expressly "declined this invitation [to revisit the case of *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).]"

(Fifth Circuit opinion, attachment A-8 to Petition for Writ of Certiorari) The "disposition of this case turns on the plaintiff's failure to present any evidence that demonstrates that she has been the victim of religious discrimination." *Id.* The Fifth Circuit reviewed the merits of the Petitioner's complaint, not her pleadings.

ARGUMENT FOR DENIAL OF THE WRIT

I. The Court should deny certiorari because the Fifth Circuit was correct in its determination that Petitioner failed to create an issue of material fact on whether the Respondents' conduct was sufficient to sustain a § 1983 claim.

The fulcrum of the Fifth Circuit's analysis lies in Petitioner's failure to meet her burden of overcoming the Respondents' qualified immunity, as asserted in their motion for summary judgment with supporting affidavits. The burden is on the plaintiff to overcome defendant's qualified immunity. *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983). To overcome a state official's qualified immunity, a complainant must establish that the official's conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). The issue here was whether the Respondents' conduct violated clearly established law. The district court and the Fifth Circuit held that it did not.

Although Petitioner responded to the Respondents' Motion for Summary Judgment with arguments and affidavits and also amended her complaint, she failed to either plead or produce any facts which objectively supported her claim that she failed two dental examinations because either of the Respondents discriminated against her because of her religion. Bare allegations of malice do not suffice to subject a governmental official either to the cost of trial or the burdens of broad-reaching discovery. *Harlow, supra*, 102 S.Ct. at 2738.

Petitioner argues that the Fifth Circuit erred in applying the "heightened pleadings standard" adopted in *Elliot v. Perez*, 751 F.2d 1472 (5th Cir. 1985), because the Supreme Court recently rejected this standard in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160 (1993). However, the Supreme Court in *Leatherman* distinguished a motion to dismiss for failure to state a claim from a motion for summary judgment by noting that "federal court litigants must rely on summary judgment to weed out unmeritorious claims sooner rather than later." *Leatherman, supra*, 113 S.Ct. at 1163. This is exactly what the Respondents did in this case.

II. This Court should deny certiorari because Petitioner has misinterpreted *Hafer v. Melo* in asserting that Respondents have personal liability in their official capacities

Petitioner argues that the Fifth Circuit erred in "failing to address the individual liability of the defendants in their official capacities." For support, she cites *Hafer v. Melo*, 112 S.Ct. 358 (1991). In their official capacities, the Respondents have no personal liability. State officials may be held liable for damages only in their individual capacities under 42 U.S.C. §1983. *See Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989). The Fifth Circuit did address the issue of individual liability in its discussion of qualified immunity and the merits of Petitioner's complaint.

Petitioner also argues that the Fifth Circuit erred in denying injunctive relief as against the Respondents in their official capacities. The decision on the merits of this case--that is, that Petitioner failed to create an issue of material fact--disposed of any outstanding issue as to whether the official capacity defendants were liable for violating Petitioner's rights, and hence whether Petitioner was entitled to any injunctive relief.

III. This Court should deny certiorari because the Fifth Circuit was correct in its determination that 42 U.S.C. § 1985 applies only to conspiracies motivated by class-based animus.

Although Petitioner insists that the Fifth Circuit's opinion "affirmed, without comment, that 42 U.S.C. §§1985 and 1986 apply only to conspiracies motivated by racial animus," in fact, the Fifth Circuit expressly declined to "join the legal debate concerning the reach of §1985 and address specifically whether it applies to religious discrimination" because such a decision was "unnecessary to the resolution of the present case." Instead, the Fifth Circuit's opinion turns on the narrow issue of Petitioner's failure to identify evidence in support of the proposition that the state officials in question discriminated against Seventh Day Adventists *as a class*.

IV. This Court should deny certiorari because the Fifth Circuit was correct in its determination that Tex. Rev. Civ. Stat. Ann. Articles 4551j is not a waiver of qualified immunity.

Tex. Rev. Civ. Stat. Ann. article 4551j (West 1993) states:

> In the absence of fraud, conspiracy, or malice, no member of the Texas State Board of Dental Examiners. . .shall be liable or subject to suit or suits for damages for alleged injury, wrong, loss or damage allegedly caused by any of the said persons for any investigation, report, recommendation, statement, evaluation, finding, order, or award made in the course of any of said persons performing assigned, designated, official, or statutory duties. *This immunity is enacted to relieve and protect the persons named from being harassed and threatened with legal action while attempting to perform official duties.*

Emphasis added.

Contrary to Petitioner's argument, this article is *not* a waiver of qualified immunity in federal court but is, on its face, a grant of absolute immunity in state court.

Furthermore, assuming *arguendo* that this statute waives immunity, it can waive it only in state court and not federal court. A state legislature may abrogate immunity in state court by statute but does not have the power to amend federal law to abrogate state defendants' qualified immunity in federal court. Article 4551j is not a clear and unambiguous waiver of state officials' qualified immunity. On its face, *article 4551j is simply not a waiver*.

CONCLUSION

Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via U.S. Mail, certified, return receipt requested on this the 20th day of May, 1994 to:

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JOHN B. LAY
Assistant Attorney General